United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

(41875)

ORIGINAL

74-2427-2482

To be argued by
MARK D. LEFKOWITZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74-2427 and 74-2482

Detainees of the Brooklyn House of Detention for Men, RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, THEODORE R. WEST, Warden, Brooklyn House of Detention for Men, ABRAHAM D. BEAME, Mayor of New York City, LOWELL B. BELLIN, Health Commissioner and Health Services Administrator of the City of New York, individually and in their official capacities,

Defendants-Appellants.

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, ABRAHAM D. BEAME, Mayor, City of New York, SALVATORE LATORRE, Warden, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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Preliminary Statement

This is an appeal from a judgment and order of the United States District Court for the Eastern District of New York (JUDD, J.), entered October 2, 1974, which vacated a prior order and enjoined, with certain qualifications, confinement of two pre-trial detainees in a single cell at the Brooklyn and Queens Houses of Detention (hereinafter also BHD and QHD, respectively). The Court also dismissed the complaints in the *Valvano* and *Brooklyn House* actions as to all other issues raised and tried by the Court.

The *Valvano* action, commenced in 1970, relates to the Queens House of Detention; the *Detainees of the Brooklyn House* action, commenced in 1973, relates, of course, to the Brooklyn House of Detention. Both were brought as class actions pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201. They both challenge the constitutionality of conditions under which persons are held in pre-trial custody by the City of New York at BHD and QHD.

The issues raised by both complaints were consolidated at trial, but only two issues were tried: (1) the alleged unconstitutional condition of overcrowding, and, more specifically, the confinement of two inmates in a single cell (hereinafter referred to as double celling); and (2) the alleged unconstitutional excessive confinement of inmates. Other issues raised but not tried, namely the issues of disciplinary procedures and correspondence rules, were not dismissed by the Court. Issues regarding visiting hours and recreation were dismissed without prejudice to plaintiffs who could raise them in another action.

Question Presented

Does the confinement of two pre-trial detainees in a single cell violate the Constitution?

Facts

(a)

The Institutions

QHD, a multi-storied facility, houses its inmates on four floors, to wit, the third, fourth, fifth and sixth floors of the institution. The fourth and fifth floors are divided into four sections, which, in turn, are divided into an upper and a lower tier with each tier containing fifteen cells. The third and sixth floors differ only in that one section of each floor contains a dormitory rather than cell tiers. QHD has a rated capacity for 520 inmates. Its average daily population in December, 1973, the month preceeding the trial, was 677. On February 5, 1974, two days prior to the close of the trial, the population was 600. There are 360 cells in QHD. Each cell is eight feet long by five feet wide by eight feet high. All cells are furnished with one table, one seat, one toilet, one sink, one mirror and two bunk beds (856a-859a)*.

As of March 6, 1974, the average length of stay at QHD for detainees charged with misdemeanors was three to six weeks; for detainees charged with felonies, three to nine months; for detainees charged with homicide, nine months to two years (858a).

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* Unless otherwise indicated, numbers in parentheses refer to the pages of the Joint Appendix.

At BHD, inmates are housed on seven floors of the institution. All but two of these floors are divided into four sections (the third and tenth floors have only two sections). These sections are divided into an upper and lower tier and each tier contains fifteen cells. The capacity for housing inmates is 814. The average daily population in December 1973, the month preceding the trial was 1,008. On February 5, 1974, two days prior to the close of the trial, the population was 1,087 (860a-861a).

There are 814 cells at BHD, each of which measures seven feet eleven inches long by five feet wide and eight feet and one-half inch high. The cells are furnished with one table, one seat, one toilet, one sink, one mirror and two bunk beds (862a).

As of December 4, 1973, the percentage of detainees with cases pending in Criminal Court who had been confined at BHD for up to 90 days was 43.1%. The total number of detainees at BHD who had cases pending in Criminal Court was 58 (861a).

Also, on December 4, 1974, the percentage of detainees at BHD with cases pending in the Supreme Court who had been confined for up to 90 days was 62.7%. The total number of detainees at BHD who had cases pending in the Supreme Court was 351 (862a).*

Both institutions house sentenced inmates, who comprise a small portion of all inhabitants. These inmates are assigned work at the institutions.

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* The figures for average confinement at BHD and QHD, recently released, indicate that 54.7% of all adult inmates are confined up to 90 days at QHD; the same figure for BHD is 56.1%.

The Trial

The trial was conducted on January 21, 22, 23, 24, 25 and February 7, 1974. The Court had toured BHD on January 16, 1974, and QHD on January 17, 1974. The plaintiffs called eleven witnesses, and introduced ten exhibits. Defendants called four witnesses and introduced twelve exhibits. The examination of the trial testimony and exhibits which follows will be limited to a discussion of that which was relevant to the issue of double celling, although there will be instances, as Judge JUDD pointed out in his opinion (875a), where the issue of excessive confinement relates to the issue of overcrowding.

Plaintiffs' witnesses were six inmates of both institutions; Louis P. Gengler, Warden of the Federal Detention Center, New York City; Donald H. Goff, Director of the United States Commission on Civil Rights, Prisoners' Rights Project; Robert B. McKay, Dean of New York University Law School, former Chairman of the New York City Board of Corrections, and former Chairman of the New York Special Commission on Attica; Dr. Augustus Kinzel, a practicing psychiatrist and instructor of psychiatry at Columbia University, New York; and Lansing Thorne, a photographer-investigator of the Legal Aid Society.

The defendants' witnesses were Arthur Rubin, then Warden of QHD; Theodore West, Warden of BHD; John A. Guzman, Assistant Deputy Warden, BHD; and H.H. Anthony Cooper, Deputy Director of the Criminal Law, Education and Research Center (CLEAR) of New York University, and Deputy Director of the Center of Forensic Psychiatry of New York University.

(1)

Ronald Foy, an inmate at BHD, testified that he had a cellmate whom he "got along with" at times, and at other times, he did not (99a). He explained that they had different habits, *e.g.,* his cellmate would read at night while he went to sleep (100a). Mr. Foy stated that his partner had "bad hygienic habits" (100a). He also complained that when his partner urinated in the toilet bowl this would cause water to splash "on the head of [his] bed" (101a). The witness also accused his cellmate of "going through" his personal belongings (103a-104a). When asked if he ever had a fight with his cellmate, the witness responded, "No. Because I feel I am able to restrain myself" (111a).

Mr. Foy stated that it was degrading for him to have to "go to the bathroom" with his cellmate present (113a). He also testified that there was tension between them, particularly when his cellmate had family problems (114a). He concluded his direct testimony by responding that there was not sufficient room in the cell for two inmates (114a).

On cross-examination, Mr. Foy testified that during lockout time (the time when inmates are not confined to their cells) the cell doors are open (116a). He responded that someone could walk into his cell during this time (116a-117a). The witness was then asked (117a):

> "Q. So you can't really state to a reasonable certainty that it was your roommate as opposed to someone else on the floor that messed up your possessions? A. After going to court six or seven times and finding the same thing, it has to be the same person.
>
> Q. But anyone can get in your cell? A. It would have to be noticed.
>
> Let me state this—

Q. Just yes or no—

The Court: Just answer the question. I will draw the inference I think proper."

Antonio Negron, a former inmate at BHD testified that he preferred to have his "own cell", and not share it with anyone else (130a). He talked about the inconveniences associated with being confined with another inmate (130a-131a). Generally he spoke of the lack of privacy and the tension between cellmates (130a-131a).

On cross-examination, Mr. Negron was questioned concerning his testimony about tension within the institution. The following colloquy occurred (139a-140a):

"Q. You testified on direct examination that at the institution tempers between the inmates ran short and there was some tension? A. There is tension.

Q. Is this not true of other institutions as well?

Was there any tension at the upstate institution where you served? A. The tension up there is a different type of tension.

* * * * *

Over here, I don't know what time I'm going to get. Up there I know when I am getting out."

Ronald Smith, an inmate at QHD, stated that when a new inmate is assigned to share a cell with another, "[y]ou got to sleep with your eyes open and adjust your whole self again" (151a). He testified that he had a cellmate who talked about hanging himself, walked naked about the cell and then "[played] in the toilet bowl" (152a-153a). Mr. Smith also stated that he had problems with his cell partner when it was time to go to sleep and, against his partner's

wishes, he wanted to read (224a). There was a basic suspicion between them (231a). The witness also explained the discomfort when his cellmate used the toilet (232a).

In addition, Mr. Smith testified that homosexuals from other cells had "come to his cell" (233a). He also had observed fights and a stabbing outside the shower room (234a). There were arguments between cellmates (234a-235a). The witness himself had been involved in four fights, the latest of which occurred, apparently, in the dayroom (235a). Mr. Smith concluded his direct testimony by stating that for privacy reasons, he preferred to occupy a cell by himself (238a).

On cross-examination, the witness's examination before trial was introduced on the question of how many fights Mr. Smith had while an inmate at QHD (243a-244a). He had testified on direct examination that he had been involved in four fights. At his examination before trial he responded that he had been involved in six fights (243a). When asked if all these fights were with his cellmate, Mr. Smith responded, "No, I said two, with, my cellmate" (244a).

Raymond Moctezuma, an inmate at BHD, testified that double celling intruded on his privacy (202a). He stated that as a result of his confinement in a cell with another he experienced such inconveniences as having water splashed in his face while his partner was washing (204a-205a), and having to endure his cellmate's objectionable personal hygiene habits (203a).

In addition, Mr. Moctezuma testified that his personal belongings had been gone through by his cellmate (203a). The witness described situations where one cellmate's activity within the cell would irritate the other (203a).

On cross-examination, Mr. Moctezuma testified that his "double celling" experience at Rikers Island was "emotionally disturbing" (214a). The witness was then confronted with his examination before trial during which he stated that his experience at Rikers Island "at which time [he] had a cellmate" had no effect upon him (214a).

The witness also admitted that it was possible that other individuals besides his cellmate could have "rifled through" his papers, since the doors to the cells were open during lock-out time (218a). Mr. Moctezuma also admitted that he volunteered to be placed in a cell with another inmate (219a).

Charles Bruner, an inmate at QHD, and a former inmate at BHD, testified that "it's distracting if [his cell mate] wants to go to the bathroom, defecate or something" when he was eating (260a). He explained that in a singly occupied cell, it would be more relaxing (264a). Fighting within a cell was apparently more dangerous to the witness than fighting "in a tier" (264a). Mr. Bruner also stated that he went to sleep during lock-in time (272a, 275a).

On cross-examination, Mr. Bruner testified that he read for an average of one and one-half hours per day (275a). Mr. Bruner, who had been detained at QHD for three months, had never been involved in a fight (275a).

Robert Finley, an inmate at QHD, testified concerning a fight he had with his cellmate (432a-433a). On cross-examination, he was asked if he had seen any fights away from the cells (466a). He responded that he had "outside of the tiers" (466a). Mr. Finley also stated that for approximately two months he had occupied a double cell alone, but then requested a transfer because *one of the two* beds

in the cell was in disrepair (452a). When asked if he knew that there was a great likelihood that his transfer request would result in his being confined with a fellow inmate, the witness responded, "Yes, but at that time I had no choice because the bed was broken" (452a).

After the witness and his inmate had been placed in punitive segregation for fighting, the administration at QHD separated the two (452a).

(2)

Plaintiffs' expert witnesses testified as follows:

Donald Goff, Director of the United States Commission on Civil Rights, Prisoners' Rights Project, stated that in his opinion, the confinement of two individuals in a single cell is an undesirable correctional practice (294a). He testified that this confinement creates what he termed "human compression" (301a), accompanied by an increase in tension (302a). Mr. Goff stated that single celling of inmates could reduce administrative problems, fights, incidents of sodomy and inmate anxiety (302a). He emphasized the need and desirability of inmate privacy (302a).

Mr. Goff testified that the standards of the American Correctional Association "call for one man to a cell" and "50 square feet for each individual" (298a). The United Nations Standards were also discussed (296a-297a). Mr. Goff stated that while he believed that the cells in the Brooklyn and Queens Houses were adequate according to present standards for one inmate per cell, he noted that the American Correctional Association is considering changing its standards to require 80 square feet per inmate (300a). Mr. Goff had last visited BHD and QHD for a time period of "possibly an hour in each one of them" (326a).

The correctional standards which Mr. Goff discussed, which admittedly do not carry the force and effect of law but merely serve as guidelines, do not forbid double celling (328a). Mr. Goff was not aware of the fact that at the Federal House of Detention on West Street, New York, all but three cells house two inmates (340a-341a). These cells are 5′3″ long by 8′ wide (65a).

Mr. Goff admitted that, notwithstanding the inherent problems of double celling, prison life per se creates tension for any inmate (330a). Additional inmate programs could reduce this tension (335a), although Mr. Goff was not familiar with the programs in operation at either institution (349a).

Dr. Kinzel, a practicing psychiatrist and an instructor of psychiatry at Columbia University, New York, testified that during 1966-68 he served as a staff psychiatrist assigned to the maximum security unit at the United States Medical Center for Federal Prisoners, Springfield, Missouri (375a-376a). He stated that during this period of service, he noticed that violent prisoners were "exquisitively sensitive to physical closeness" (376a-377a). Based upon experiments which he then conducted, Dr. Kinzel constructed his theory of "body buffer zones"—i.e., physical boundaries measured in square feet signifying tension in violent and nonviolent individuals created by the physical closeness of others. These physical measurements differed from the results obtained by a Dr. Hildreth of Baltimore, Maryland (415a). Dr. Kinzel testified that his "body buffer zone" for violent prisoners was 29 square feet, while that for nonviolent inmates totaled 7 square feet (382a). In terms of straight line distances between individuals, Dr. Kinzel noted that "violent" inmates felt acutely uncomfortable

when they came within three feet, and "non-violent" inmates began to feel such anxiety at one and one-half feet (380a). The mean figure is two and one-half feet (410a).

Dr. Kinzel stated that with respect to his own "body buffer zone" measurements, even the most violent inmate becomes accustomed to closeness and that during his experiment he noticed that the "body buffer zones began to diminish, and that the zone at the end of 12 weeks was about half the size" (581a). Dr. Kinzel also noted that stress caused by close confinement is relieved by inmate movement (594a-595a). However, the day he visited BHD and QHD was a Saturday. The inmate programs are not in operation on the weekend (511a-512a, 716a).

Although, he did not examine any inmate, Dr. Kinzel concluded that the pacing by inmates in their cells was caused by institutional conditions as opposed to stress suffered by inmates (574a-575a). He stated that the pacing was due to being "caged" and not a result of the infringement of body buffer zones (575a). Dr. Kinzel testified that he could not specifically state that any particular inmate incarcerated at QHD or BHD had suffered alienation, withdrawal or despair as a result of his incarceration (577a). He also conceded that he could not specifically state that incarceration at BHD or QHD had caused any inmate to suffer panic or act out a latent homosexuality (578a).

Louis Gengler, Warden of the Federal Detention Center, New York City, a concededly overpopulated institution where the average length of confinement is 45 days (68a, 76a), testified that only three cells in his institution housed one inmate (49a). He stated that the inmates at the West Street facility are housed either in dormitories or in units known as "C tanks." These C tanks consist of four cells

housing two men per cell, with each C tank unit opening into its own small dayroom (49a). The Warden stated that during the hours between 6 a.m. and 10:30 p.m. the inmates in general population have unrestricted movement between the second and third floors (51a). Warden Gengler noted that the inmates are locked into their C tank units from 10:30 p.m. until 6 a.m. but that the doors between the cells and the dayroom contained within the C tank unit are never locked (51a).

When asked "what percentage of the inmates at the West Street institution are presently incarcerated for crimes of a violent nature," Warden Gengler responded (63a),

> "I have 19.6 percent of our population that I would classify as in for acts of a violent nature, including bank robbers, kidnappers, assaults on Federal Officers."

Of the 19.6%, Warden Gengler stated that 16% are bank robbers. The balance of 3.6% "would be people with weapons violations, assault on Federal Officers, kidnappings, skyjackings, interstate theft, hijacking of trucks in which violence occurred" (64a).

Moreover, Warden Gengler testified that the average education level for the inmate population at the Federal House of Detention is 10.5 years (65a). The average income figure is $178 per week (65a).

Warden Gengler stated that the cells of the C-unit are 5′3″ wide by 8′ long. These cells each house two inmates (65a). They contain a double bed, a commode and a locker (66a). Some also have a sink (66a).

When asked if he had any idea of the percentage of inmates confined at the West Street jail beyond two months,

Warden Gengler replied, "Maybe 30 percent" (76a). Warden Gengler also stated that one of the variables that would determine whether an inmate might commit a "negative or destructive" act would be "the length of time that [he was] there" (78a-79a).

When questioned about institutional programs at the Federal House of Detention, Warden Gengler responded that his institution does not have (a) a high school equivalency program; (b) a remedial education program; (c) an arts and crafts program; (d) an institution newspaper; and (e) nor does it have any cultural programs of a non-religious nature (88a-89a).

The witness was then asked, "If an institution fails to offer a variety of programs for the individual, does the lock-out time he is given take on increased importance?" Warden Gengler responded that it does (89a). Earlier, on direct examination, Warden Gengler had also testified that there were, in effect, limited gymnasium facilities at his Center (52a).

Robert B. McKay, Dean of New York University Law School, never visited QHD and his familiarity with BHD was limited to having visited that institution one time for "three or four hours" (181a). He testified generally, drawing from his experience as Chairman of the State Attica Committee. He agreed that "many of the positive aspects of detention facilities may appear insignificant, but [their] cumulative atmosphere for the inmates there incarcerated, is beneficial" (183a).

Dean McKay testified that if an institution (a) was close to the homes of the inmates (184a); (b) had mean-

ingful education programs (185a); (c) established procedures to insure that inmates would have access to the press (185a); (d) encouraged community groups and outside professionals to participate in the life of that institution (185a-186a); (e) established a policy of non-censorship of mail (186a); (f) did not strip search an inmate upon the completion of a personal visit (187a); (g) permitted inmates to wear their own clothing and receive changes of clothing during visits (187a-188a); (h) protected inmates from unwanted homosexual advances (188a); (i) employed a significant amount of black and Spanish-speaking personnel (188a-189a); and (j) did not separate an inmate from his doctor by a screen during his primary medical interview (190a), all of these factors would contribute to the creation of a more humane environment.

Although Dean McKay testified that the programs at BHD and QHD were "all too limited" and that "there is no vocational training" (191a-193a), he was unable to list the programs available at either institution or the areas where they took place. He was unable to tell how many times per week an inmate could go to the programs or how many inmates could be accommodated per week in each program (193a-194a).

Dean McKay was asked if double celling is an "advisable practice" he responded (173a):

> "It is an inadvisable practice. The City did it not because it is desirable, but they considered the necessity of the circumstances. I think there is uniform conclusion that it is an undesirable fact."

(3)

Defendants' witnesses testified as follows.

Arthur Rubin, Warden of QHD, a former Deputy Warden, Assistant Deputy Warden and Captain in the Corrections Department, testified that approximately 20-25% of the inmates in his institution were in court Monday through Friday (511a). When asked "if a person came to your institution to inspect it on Saturday or Sunday, would he get a true picture of the movement and of the conditions, as far as inmate population which are in your institution," Warden Rubin replied, "No" (511a). He explained that there is very little activity on weekends because the Courts were not in session and many programs are conducted only Monday through Friday (511a-512a).

Warden Rubin stated that the lock-out times at QHD are as follows: morning lock-out—8:30 a.m. to 11:00 a.m.; afternoon lock-out—12:45 to 3:15 p.m.; evening lock-out—5:45 p.m. to 10:30 p.m. (515a).

During the lock-in periods, cell sanitation, the serving and eating of meals, and the counting of inmates are conducted (515a-516a).

When asked if in his opinion it was better correctional practice to have the cells locked during lock-out periods, Warden Rubin stated (520a):

> "I believe the cells locked is better because it afford [sic] better observation on the part of the officer, and protects the belongings of the inmate when he is away from the cell.
>
> "Most of them are poor in background and they have a few meager belongings and they have it in the cell.

I have seen fights go on over the stealing of another man's property.

"There were a couple of sodomies that took place because open cells provided a ready temptation for it.

"There was a homicide in the Brooklyn House of Detention that is being prosecuted by the District Attorney.

Q. Did this occur in an open cell? A. Yes."

Theodore West, Warden of BHD, a former Assistant Deputy Warden, Captain and officer in the Corrections Department, testified that the lock-out hours at BHD are as follows: morning lock-out—8:30 a.m. to 11:00 a.m.; afternoon lock-out—1:00 p.m. to 3:00 p.m.; evening lock-out—6:00 p.m. to 9:00 p.m. (620a).*

As at QHD, cell sanitation, the serving and eating of meals, head counts and calls for Court are conducted during the lock-in periods at BHD (621a-624a).

When asked if in his opinion it is "good corrections practice to have cells open during lock-out" the Warden responded that it was not, stating that the problem is "in supervision" (636a). He illustrated (636a):

"We had a murder in Brooklyn not too long back which an inmate was hung in his cell. It was subsequently investigated by the District Attorney and what had apparently been a suicide turned out to be a homicide.

This man had broken an inmate boycott and had gone to court when the other inmates refused to go to court and he had been summarily hung in an open cell dura lockout period."

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* After the trial, the evening lock-out period was extended until 10 p.m. (Defendant's memorandum of law below at p. 54) See also Warden West's testimony at p. 633a.

Warden West was questioned concerning homosexual attacks at BHD (637a-639a). When asked if the greatest percentage of the homosexuality is committed by one cellmate on another, the witness responded that it was not, and that in his experience "most of these things take place as a result of the action on the part of more than one man forcing another one to submit" (639a). He explained (639a):

> "I would imagine that the greater percentage are, from, I say, groups of men forcing a man into a position in a shower room or an open cell, as the case may be, and they are ganging up on him and forcing him unto submission."

When asked if he had "any figures on this," Warden West responded (639a):

> "I'm told and I believe there were six reported in a year and I think one or two of these were between two cell partners, the rest were as a result of gang actions, group of men picking on a single man."

When questioned if an inmate would experience a reduction in tension if he occupied a cell by himself, Warden West responded (697a):

> "I'm going to qualify my answer because I see many times in which it is, from an administrative penological point of view, it is sound common sense to double men up in a cell, and I'm referring now to a man who has been identified in his—as in a state of depression. I am referring to a man who has received bad news from home—"

Warden West stated that he was referring also to suicide risks, although "there are men who come into the prison

and ask to be doubled as they come right through the receiving room" (697a-698a). When asked if the majority of men preferred to be detained alone in a cell, the witness replied (698a):

> "Apparently not because I am not getting complaints on that line. This type of complaint is not surfacing at the meetings with the inmates."

When asked his preference as to one or two inmate cells, the Warden responded that except for suicide risks, administratively, one man cells would be preferable, providing he had the flexibility to move these inmates (698a-699a).

With respect to those factors which Dean McKay had agreed as contributing towards a more humane jail environment, the testimony of various of the defendants' witnesses indicated that BHD and QHD provide the following: Inmates at BHD and QHD are close to their homes (521a, 637a). There are a multitude of cultural and educational programs (*e.g.*, high school equivalency classes), which also encourage community participation (492a-515a; 714a-729a). Approximately 1000 persons are granted access to QHD for purposes of working with and assisting inmates (481a-482a). Both institutions have established procedures for giving inmates full and complete access to the press (522a, 643a), and neither institution censors inmate mail (522a). Inmates are permitted to wear their civilian clothing and receive changes of such clothing during visits (523a). It was also established that BHD and QHD attempt to protect inmates from unwanted homosexual advances (526a, 637a-638a). The institutions do not strip search an inmate upon the completion of a personal visit (523a). The institutions employ a relatively high compliment of black and Spanish speaking personnel (527a-528a).

John A. Guzman, Assistant Deputy Warden of BHD, testified concerning many of the educational and cultural programs available to BHD inmates as mentioned above (714a-729a).

The testimony of *Professor H.H. Anthony Cooper,* Deputy Director of the Criminal Law, Education and Research Center (CLEAR) of New York University, focused principally on classification schemes and their applicability to detainees, an issue which is not now before this Court (761a-801a).

(b)

Judge Judd's memorandum decision and order, reproduced in the Appendix at pages 864a-877a, described in detail both detention facilities and examined the allegations and testimony regarding overcrowding and excessive confinement. A discussion of activities available at BHD and QHD followed. The Court then noted that the classification system at both facilities was inadequate.

After first stating that "pretrial detainees should be held under the least restrictive conditions compatible with security", the Court observed that "budget-makers give a low priority to correctional institutions in both state and federal areas and . . . that federal courts may function only to protect inmates from deprivation of constitutional rights not to declare optimum policies for state administration or finding."

Regarding double celling, Judge JUDD stated "there is square authority that there should not be more than one man in a cell", citing *Inmates of the Suffolk County Jail*

v. *Eisenstadt,* 360 F. Supp. 676 (D. Mass., 1973), affd. 494 F.2d 1196 (1st Cir., 1974), and the American Correctional Association Standards. Although the Court recognized that there may be a few cases where inmates prefer to have cellmates, and although he recognized that there will be problems created by single occupancy, Judge JUDD stated "the practice should be eliminated as soon as possible".

Plaintiffs were denied relief with respect to their claims of excessive confinement. The Court, after first noting that excessive confinement and overcrowding are interrelated, anticipated that additional lock-out time would become available after the double celling was eliminated. The Court also ruled that feeding inmates in their cells is not a violation of the Constitution.

After Judge Judd issued his order of July 31, 1974, both parties moved for an amendment of the order. On October 2, 1974, the Court issued a new judgment and order which vacated the prior order and directed the following: As established in the prior order, beginning September 1, 1974, no inmate was to be double celled for longer than 30 days unless on the voluntary written consent of both persons. As of March 1, 1975, there is to be no double celling without the voluntary written consent of both inmates although involuntary double celling would be permitted in the cases of (a) a person duly enrolled in a methadone detoxification program (not to exceed 10 days); (b) a person in need of mental observation due to depression and/or potential suicidal tendencies certified in writing by a staff psychiatrist (not to exceed thirty days); such persons cannot be confined for longer periods if cells with at least twice the floor space of the present cells are

utilized; (c) emergencies certified by the Commissioner of Correction where cell repairs are required (not to exceed thirty days); and (d) all other emergencies certified by the Commissioner of Correction (not to exceed 10 days). Defendants were also directed to maintain a written record of all instances of double celling (920a-922a).

Plaintiffs moved to hold defendants in contempt of court for failing to comply with this order. Defendants were essentially charged with inadequate notice to inmates of the Court's order of October 2. The Court denied plaintiffs' motion to hold defendants in contempt but ordered that a new, court approved form of notice be presented to the inmates (961a-963a).

Defendants filed their notices of appeal in both cases from the October 2nd order and then moved in this Court for a consolidation of the appeals. This motion was granted (964a-974a).

ARGUMENT

The holding herein that the confinement of two pretrial detainees in single cells at these institutions was violative of their constitutional rights was error.

(1)

Essentially, the question presented on this appeal is that of the reach of this Court's recent decision in *Rhem et al.* v. *Malcolm et al.*, —— F.2d —— (November 8, 1974), slip op. 377, upholding the District Court's finding of violations of the constitutional rights of detainees at the Manhattan House of Detention. In the instant cases involving two other City jails, no such record as was made in *Rhem* is involved, and the City does not concede, as it

did in that case, see slip opinion at page 384, that conditions at QHD and BHD are "very uncomfortable." At the same time, the City is prepared to concede that the hardships associated with double celling of inmates at these two institutions are not "absolutely requisite for the purpose of confinement only." *Jones* v. *Wittenberg,* 323 F. Supp. 93, 100 (N.D. Ohio, 1971), 330 F. Supp. 707 (N.D. Ohio, 1971), aff'd *sub nom. Jones* v. *Metzger,* 456 F.2d 854 (6th Cir. 1972), quoted from with apparent approval in *Rhem,* slip op. at 382.*

If the test just quoted is in fact the law in this Circuit, the order here appealed should be affirmed. Alternatively, if this Court is of the view that the record here presents a picture of hardships on the order of those involved in *Rhem,* then affirmance is also called for. We submit that nothing like the totality of circumstances presented in *Rhem* is here presented, and we further submit that it could not have been the intention of this Court in *Rhem* to adopt as the law of this Circuit the *Jones* v. *Wittenberg* test stretched to its ultimate, and most literal extent.

We begin with the premise that being in jail is "uncomfortable" and is a "hardship." The initial question here presented is at what point the discomfort or hardship imposed presents even a *prima facie* issue of unconstitutionality, requiring justification. The second question presented is whether, assuming a sufficient showing of some measure of hardship has been made to require some justification, what will suffice by way of justification. Despite the *Rhem* decision's quotation of the *Jones* v. *Wittenberg* test, we do not read the *Rhem* opinion, overall, as literally adopting that test, *i.e.,* as making federally cognizable every

* We note here that the Court in *Jones* v. *Wittenberg* recognized that double celling was constitutional. Its order proscribed the detention of *more than two* inmates in a single cell. 330 F. Supp. at 714.

jail hardship and requiring that every hardship be justified on the ground that it is "absolutely requisite for the purpose of confinement only." Rather, taken overall, and especially in light of that portion of the opinion dealing with the reasons for remand, slip op. at pp. 390-392, we read *Rhem* as meaning only that a pre-trial detention facility must meet constitutionally minimal standards, and that in determining such constitutional standards the courts may look, *inter alia,* to the needs and resources of the governmental entity operating the jail. If we are correct in so reading *Rhem,* then we further submit that (1) the showing of hardship made below simply did not rise to the level of a federally cognizable constitutional claim, and (2) in any event, any such hardship, as balanced against the limited resources and needs of the City, should not be held unconstitutional.

(2)

At the outset, we do not dispute that double celling of inmates at these institutions is generally both less desirable and more unpleasant than would be assigning but one inmate to a cell. However, we submit, the loss of privacy and possible indignities caused by this practice were not shown to add appreciably to the hardships necessarily imposed by the fact of incarceration itself. Any incarceration of a large number of men in a metropolitan jail will produce tensions and loss of privacy and will cause grounds for complaint. For example, dormitory housing and common toilet facilities will result in a loss of privacy which may well be offensive to many inmates. Indeed, the fact of confinement itself is most unpleasant.

We do not doubt that having to share a cell with another detainee, who may not be to the liking of the inmate, may

be most unpleasant. We also do not dispute that the fact of close and intimate confinement for major portions of the day may exacerbate such unpleasantness. Yet, based upon the testimony below, we do not believe plaintiffs established anything more than that certain inmates, often on grounds that were not substantial or were highly subjective or individualistic, found this practice unpleasant.

With respect to the testimony of plaintiffs' witnesses, both inmate and expert, offered to show that double celling contributed appreciably to fighting, thefts, incidents of homosexuality and tension in general, this testimony was at best inconclusive.

Inmates complained about having their personal belongings gone through while they were away from their cells. Generally, they suspected that their cellmate had done this. However, on cross-examination it was elicited that since cell doors were open during lock-out time, it could not be proved that a cellmate had gone through a partner's belongings. It could have been another inmate who committed the act during a lock-out period. (Testimony of Ronald Foy, 116a-117a; Raymond Moctezuma, 218a.)

The occurrence of fights between cell partners was also explored at trial. It was not proved, however, that double celling is uniquely conducive to promoting fights between detainees. Ronald Foy testified that at times he "got along" with his cellmate and at other times he did not (99a). He testified that he was never involved in a fight with his cellmate because he was able to restrain himself (111a). Ronald Smith testified on direct examination that he had been involved in fights at QHD, and that he had observed other fights and a stabbing *outside the shower room.* On

cross-examination Mr. Smith admitted that only two of the fights which he had been involved in were with his cellmate (234a, 244a). Robert Finley testified that he had a fight with his cellmate but he had observed fights outside the cells (466a).

Thus it cannot be concluded that fighting in the institutions is significantly aggravated as a result of tension caused by double celling. It would be an impossible task to determine whether a fight with a cell partner is a direct cause of tension created by double celling or that created by confinement generally.

With respect to the limited inmate testimony concerning homosexuals in each institution, it was not proved that incidents involving homosexuality were strictly between cellmates. Ronald Smith testified that homosexuals from *other* cells had visited his cell (233a). In addition, Wardens Rubin and West testified that these incidents occurred during lock-out periods when cells were open (520a). Warden West explained that the homosexual incidents generally took place "as a result of the action on the part of more than one man forcing another one to submit." These incidents occurred in shower rooms and in open cells (639a).

In examining the inmate testimony we note that it is quite difficult to determine the effect double celling has on detainees because it is entirely too subjective. Raymond Moctezuma testified on cross-examination that his "double celling experience" at Rikers Island was "emotionally disturbing" (214a). However, at his examination before trial he had stated that it had no effect upon him (214a).

Moreover, Charles Bruner testified that he was able to sleep during lock-in time (272a, 275a). Apparently he was

not as anxious as Ronald Smith who testified that when double celled "[y]ou got to sleep with your eyes open and adjust your whole self again" (151a). Mr. Bruner, who had never been involved in a fight testified that he read for an average of one and one-half hours per day (275a). Obviously the "double celling experience" affects each individual differently.

Turning next to the testimony of plaintiffs' expert witnesses, we first deal with that of Donald Goff. Mr. Goff testified that single celling of inmates could reduce fights, incidents of sodomy, and inmate anxiety (302a). Although Mr. Goff had visited BHD and QHD for "possibly an hour" each, his testimony cannot be given much weight in determining if these incidents can be reduced by single cell occupancy. This is particularly so after examining the inmates' testimony and the statements of Wardens Rubin and West, who are veteran correction officers, on this very subject. Moreover, Mr. Goff was not aware that the Federal House of Detention on West Street, New York City, double celled its inmates (340a-341a).

Mr. Goff did testify that inmate programs could reduce the tension of jail life, although he was not familiar with the programs in operation at either institution (349a). A quick glance at all the various programs BHD and QHD have to offer their inmates would substantially support the proposition that jail tension of all forms is greatly reduced through these activities.

We question the applicability of Dr. Kinzel's "body buffer zone" theory here. Assuming it is a valid theory, it is possible for inmates who are double celled to maintain the mean distance of two and one-half feet from one another without violating the "buffer zone" boundaries. Dr.

Kinzel also conceded that even the most violent inmate becomes accustomed to closeness. He testified that body buffer zones diminish with time and that the zone at the end of twelve weeks was about half the size (581a). Dr. Kinzel similarly conceded that stress caused by close confinement is relieved by inmate movement (594a-595a). He was not able to observe inmate activities at BHD and QHD because he had visited the institutions on a Saturday when the inmate programs are not in operation.

Although he did not examine any inmates, Dr. Kinzel concluded that pacing by inmates in their cells was caused by unconstitutional conditions in their cells and not by stress in their cells nor by the infringement of body buffer zones (574a-577a). He would not conclude, however, that confinement at BHD or QHD caused any inmate to panic or act out a latent homosexuality (578a). He would also not conclude that alienation, withdrawal or despair resulted from incarceration (577a).

Dean McKay criticized the programs at BHD and QHD as "all too limited" (191a-193a). However, he was unable to list the programs of the institutions or the areas where they took place. Also, he was unable to state how often an inmate could participate in the variety of programs available at the institution, or how many inmates could be accommodated per week in each program (193a-194a).

The deprivations of privacy which were described in the witness' testimonies cannot be analyzed for constitutional significance without also considering several counterbalancing factors (see also references to McKay testimony, *infra,* 14-15):

(a) The actual lock-in time at both institutions is approximately fourteen to sixteen hours per day. During this

time the inmates are fed, and of course they sleep. In addition, many read during this period, while others prepare their cases.

(b) If an inmate is on trial, he is not in the institution for most of the day and therefore he is not suffering from any deprivations of privacy associated with double celling.

(c) Inmates at BHD and QHD are generally not confined for more than a few months. See, *infra* at pp. 3-4. Clearly the length of one's confinement can mitigate any deprivation which might occur.

(d) As testified to at trial, inmate movement in the form of educational, cultural and athletic programs will also mitigate tension. This is true whether that tension has been caused by confinement in general or, more specifically, by double celling.

Considering the totality of the circumstances at these institutions, it is unreasonable to conclude that the practice of double celling by itself violates the Constitution.* It is a common practice, although one which concededly is far from ideal. Moreover, notwithstanding double celling is not the ideal situation, there are many positive aspects to double celling which should not be overlooked. It is not unreasonable to assume that friendships between inmates confined to the same cell may develop. Also, one inmate might be able to console another who has received bad news from home. See Affidavit of Dr. Frank Rundle, Appendix 888a-889a. Indeed, Warden West testified that there were inmates who requested double celling and that other inmates did not complain about being double celled (697a-698a).

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* Judge Judd discussed double celling strictly as a matter of law in his decision.

Given the above described testimony, we submit that plaintiffs here proved at most that double celling was found unpleasant by certain inmates and was not the ideal, most desirable form of confinement. They did not, we submit, make any kind of showing that this practice, taken alone or in conjunction with the totality of other circumstances at these jails, imposed any substantial additional hardships on the inmates over and above that which would necessarily be caused by confinement in any large metropolitan jail. Accordingly, we submit that they did not make out even a *prima facie* case for requiring further inquiry by a federal court into the constitutionality of this practice.

(3)

Assuming arguendo that plaintiffs did make a case for further judicial scrutiny, we submit that their case fell woefully short of establishing that, on balance, the practice here complained of is so constitutionally offensive that the City, given its limited existing jail facilities and financial resources, should be required to build additional jail facilities to house its prisoners in Brooklyn and Queens (or elsewhere). As was pointed out to the Court below in a post-trial affidavit of counsel (935a-938a), double celling is practiced at all the City's jails (which at that time included the since closed Manhattan House of Detention and Branch Queens House of Detention), and it would be simply impossible to accommodate all City detainees single celled in the City's existing facilities. We are aware that, under *Rhem,* fiscal considerations are not a sufficient excuse for perpetuating intolerable conditions. However, we submit that the showing of "hardship" made here cannot justify requiring the City to invest the vast sums which would be needed to construct sufficient new jail facilities to single cell house all detainees.

(4)

We believe that a review of the pertinent decisions supports our position.

Jones v. *Wittenberg,* 323 F. Supp. 93 (N.D. Ohio, 1971), 330 F. Supp. 707 (N.D. Ohio, 1971), affd. *sub nom. Jones* v. *Metzger,* 456 F. 2d 854 (6th Cir., 1972), involved an action by detainees. Three-fourths of the inmates were held in pretrial detention in the 76 year old jail.

There was no ventilation or lighting in the cells or the "bullpen" (lock-out) area. Many windows could not be opened. Plumbing problems rendered some cell toilets inoperable. The population was, at times, double the capacity of the institution. This resulted in some prisoners having to sleep on the floor, a condition made worse by leakage from pipes running on the floor. There were as many as four bunks in some of the 6′ by 9′ cells. The inmates received shaving materials, but there were only two mirrors for the whole population. Food preparation was below health regulations and generally inadequate, considering nutritional balance and caloric content. No provision was made for washing of the clothes of inmates.

Visits were allowed only three hours per week and only on Sunday. They were conducted while standing and speaking through heavy screens. Children under the age of 18 were not permitted to visit. Attorney visits lacked privacy. There were no telephones for inmate use. Medical facilities were primitive, and there were no recreational, educational or social activities. Isolation cells were brutal, and punishment was imposed without due process.

The District Court summed up the conditions as follows (323 F. Supp. at p. 99):

> "We may suppose that the constitutional provision against cruel and unusual punishment was directed against such activities. In any event, when the total picture of confinement in the Lucas County Jail is examined, what appears is confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette."

After handing down its first opinion, with its findings, the District Court held further hearings. In its second opinion it rejected the idea of requiring the construction of a new jail, stating that it did not have the power to require public funding for this purpose (330 F. Supp. at 712-713). The Court did direct, in detail, the remedying of conditions in a manner which did not involve substantial expenditures. The only physical change directed was a limited one with regard to lighting (*Ibid.* at pp. 714-721). And it required that a plan be submitted with regard to repairs or remodeling of a very limited nature (*Ibid.* at p. 721).

On appeal, the only issue discussed, aside from those relating to jurisdiction of the federal courts, was one relating to the directions which affected the sheriff's budget and the deployment of guards. The Circuit Court pointed out that all that was required merely involved specified changes in the budget and the assignment of manpower,

changes which were necessary and appropriate and which would not appreciably adversely affect the ability of the sheriff to perform the other duties imposed upon him by law.

Apparently no issue was raised on appeal with regard to what conditions violated the Constitution. Again, we note here that the Court in *Jones* v. *Wittenberg* recognized that double celling was constitutional. Its order proscribed the detention of *more than two* inmates in a single cell. 330 F. Supp. at 714.

Inmates of Suffolk County Jail v. *Eisenstadt,* 360 F. Supp. 676 (D. Mass., 1973), affd. 494 F. 2d 1196 (1st Cir., 1974), a case relied upon by Judge JUDD in concluding that double-celling is impermissible, was another action by detainees. Of the population of the jail involved, 85% had not yet been tried. The cells were 8′ wide by 11″ long, constructed for single occupancy. Although only 142 cells for men were operable, the jail housed, on the average, 340 men. Nearly all of the usable floor space was taken up by two cots in the cell. Yet each day the men were confined to their cells for between 19 and 20 hours.

The jail was 125 years old. The paint was cracking in many places, and the floors were damp. Heat and cold during the respective summer and winter seasons were extreme. Mattresses were soiled and worn; cells were cramped; plumbing was leaky; toilets and sinks were corroded and filthy, and a fecal smell emanated from many toilets; and the water was either scalding hot or ice cold.

The jail was a fire hazard, and infested with mosquitoes, roaches, rats and waterbugs. Pigeons roosted inside the institution.

There was a din which persisted 24 hours a day, and "the noise seemed to increase after midnight and approached a virtual bedlam which lasted until dawn" (360 F. Supp. at p. 680, fn. 8).

In some sections, floors appeared near collapse. Many of the bathing and showering facilities were broken. Medical care was inadequate, and the food was often cold and unsanitary. The cells were dirty and there was no provision to clean them. Recreation and visiting privileges were, in addition, limited.

The District Court there ordered (a) that the defendants were enjoined from confining two inmates in a cell where one is awaiting trial and (b) that no one be confined at the jail after a date more than three years subsequent to that of its opinion. In the meantime, the Court ordered, *inter alia,* that the population had to be reduced, sanitary measures instituted, lock-out time of 4 hours provided, and telephone privileges made available.

Collins v. *Schoonfield,* 344 F. Supp. 257 (D. Md., 1972) was also a suit by detainees. Eighty per cent of the inmates of the jail were awaiting trial.

Most of the testimony concerned conditions in isolation cells, mail censorship, bad and inadequate food, medical conditions, and disciplinary procedures. Inmates were allowed two 20 minute non-contact visits per week.

The non-contact visits were held not to be violative of the Constitution. The Court stated (344 F. Supp. at p. 279):

> "Yet this does not rise to the level of cruel and unusual punishment though expert testimony in this case plus

available security alternatives suggest the advisability of reconsideration."

Earlier the Court had stated the applicable test, as follows (344 F. Supp. at p. 265):

"Thus, each of plaintiffs' complaints herein must be weighed and considered in terms of whether they violate the minimal standards established by the guarantees and the proscriptions of our Federal Constitution, not in terms of what this Court might or might not think is the best or the better practice."

In *Brenneman* v. *Madigan,* 343 F. Supp. 128 (N.D. Calif., 1972), the Court found the conditions at a jail for detainees to be "shocking and debasing" and violative of due process as a matter of law. Cells for two inmates were 7′ by 7′ and drab. Confinement in the cells was virtually 24 hours a day, without any recreational or educational diversion except for a few two hour periods per week, during which time the inmates showered, shaved, or received visitors.* Heat, ventilation and plumbing were all substandard. Conditions in an adjacent facility for convicts were better. There were no educational programs, no library, and no religious services. Visiting hours were restricted to three hours on Sunday.

The Court there ordered the institution of programs for education, recreation and vocational training. In addition, it ordered access to a library and a reform of the visiting schedule and "list" of approved visitors.

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* At the time the opinion was handed down the inmates were permitted to spend the daylight hours in the exercise yard or the day rooms.

In *Hamilton* v. *Love,* 328 F. Supp. 1182 (E.D. Ark., 1971), 358 F. Supp. 338 (E.D. Ark., 1973), 361 F. Supp. 1235 (E.D. Ark., 1973), the Court found inadequate bathing and toilet facilities; no ventilation; less than minimal medical and dental care; no recreational programs or areas; overcrowded, unsanitary and insecure cells; the presence of roaches, rats and poisonous insects; no protection against assaults and homosexual attacks; the use of an isolation cell or "hole"; lack of adequately trained personnel; no classification or separation of detainees; inadequate bedding; and no laundry facilities.

Conditions were so bad that the defendants stipulated that "'* * * the general conditions presently existent at the Pulaski County jail * * * taken as a whole do not meet minimum federal constitutional requirements with respect to prisoners' rights to due process of law and to be free from cruel and unusual punishment.'" The Court there directed that an interim plan for upgrading the facility be presented until a new facility is built.

In *Johnson* v. *Lark,* 365 F. Supp. 289 (E.D. Mo., 1973), federal "prisoners" brought an action against the authorities in control of the St. Louis city jail where they were housed pursuant to a federal-state contract. Eighty-five percent of the inmates were pretrial detainees. The population far exceeded the jail's capacity. The two-man cells in this sixty year old jail were 8′ 2″ long, 5′ 2″ wide and 8′ 2″ high. At various times there were three prisoners in such a cell or a smaller one.

Clothing was not provided for the inmates, who also never engaged in fresh air exercise, nor received psychiatric services. Some prisoners had to sleep on the floor; linen, when

distributed, was unclean; the floor was damp. There were no educational programs, no library, and no law books were available. Moreover, there were no telephone privileges, and visiting hours were only two hours per week. There was also inadequate medical care and substandard sanitary conditions for food preparation. Solitary confinement cells were used for disciplinary purposes.

There, the Court ordered that the population be reduced and that only two be housed in a cell. It required that clean bedding be provided for the inmates. In addition, corporal punishment was prohibited and new disciplinary and mail rules were ordered instituted.

In *Hamilton* v. *Schiro,* 338 F. Supp. 1016 (E.D. La., 1970), convicted inmates complained of, *inter alia,* overcrowding (six to eight in a cell 13′ by 8½′ by 7½′, with some sleeping on the floor) and inadequate sanitary and medical care. There, the prison was functioning at double capacity; sinks and toilets were rusted and unclean; there was no interior lighting in the cells; mattresses were unclean; inmates had to sleep on the floor; ventilation was poor and heat excessive. In addition, the prison was infested with rats, mice and roaches; the kitchen was unsanitary; bathing facilities were inadequate; the structure itself was a fire hazard; medical care was virtually non-existent. Moreover, there was no isolation of violent, psychotic or homosexual inmates even though there were frequent assaults.

The Court ordered (*Hamilton* v. *Landrieu,* 351 F. Supp. 549 [E.D. La., 1972]), that medical care had to be upgraded, recreation programs instituted, population reduced and a classification system and educational program devised. It also directed a variety of other reforms.

The above cases clearly demonstrate that when cumulative conditions in a jail create an intolerable human environment inconsistent with the standard of least restrictive confinement necessary, then there is a deprivation of due process as guaranteed by the Constitution. In *Rhem*, this Court stated, slip op. at 384:

> "It is enough if the concededly uncomfortable conditions for detainees are so unnecessary as to be a denial of due process or compare so unfavorably with those accorded by the state to convicted defendants elsewhere as to deny equal protection of the laws. For it must always be remembered that detainees are not, as yet guilty of anything."

It cannot, we submit, be concluded that double celling is "so unnecessary as to be a denial of due process". Nor is it demonstrably a violation of the guarantee of equal protection of the laws. There was no showing below that convicted defendants in New York are never double celled, or for that matter what the general State practice is with respect to convicts. Moreover, we note that under New York State Correction Law, §137, subd. 4 double celling is not prohibited. Therefore, we conclude that in New York State convicted inmates are not afforded any more rights regarding cell occupancy than the plaintiffs here.

(5)

This Court has indicated that, at least with respect to claims of Cruel and Unusual Punishment made by convicted defendants, the federal courts should move with some hesitation in passing judgment on state practices in the fields of penology and prison administration. See *Sostre* v. *McGinnis,* 442 F. 2d 178, 190-193 (2d Cir. 1971), cert. den. *sub nom. Sostre* v. *Oswald,* 404 U.S. 1049 and 405 U.S. 978 (1972). Notwithstanding the *Rhem* decision, and notwithstanding the various bases upon which *Sostre* may here be distinguished, we very respectfully submit that a similar approach is appropriate even in the case of institutions housing unconvicted detainees—where, as here, nothing on the order of the discomforts and hardships conceded in *Rhem* is present.

CONCLUSION

The judgment and order appealed from should be reversed.

January 13, 1975.

Respectfully submitted,

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